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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MEDITERRANEAN BEST FOODS,
INC., et al.,

Plaintiffs, Cross-defendants, and
Respondents,

v.

KAREN GEVORKYAN et al.,

Defendants, Cross-complainants,
and Appellants.

B266800

(Los Angeles County
Super. Ct. No. EC058649)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Donna Fields Goldstein, Judge. Reversed
and remanded with directions.

Law Offices of Richard M. Foster, Arutyun Topchyan and
Richard M. Foster for Plaintiffs, Cross-Defendants, and
Respondents.

Law Offices of Mher Asatryan and Mher Asatryan for
Defendants, Cross-Complainants, and Appellants.

Appellant Karen Gevorkyan and respondent Arsen Kirakosian are former business associates. In this litigation, they have asserted competing claims to an Armenian bakery referred to as “Shushan Bakery” or “Shushan Lavash” (bakery), as well as to various corporations, trademarks, and equipment associated with the bakery.¹

The trial in this case proceeded in two phases. During the first phase, a jury was impaneled to decide the parties’ legal claims²—i.e., Kirakosian’s claims for fraud and breach of fiduciary duty, and Gevorkyan’s claims for intentional interference with business relations, trademark infringement, and breach of contract. The jury rejected most of both parties’ claims, but it returned a special verdict for Gevorkyan on his cause of action for trademark infringement and awarded him damages of \$240,000.

¹ Throughout this opinion, we use “Gevorkyan” to refer both to Karen Gevorkyan, an individual, and jointly to defendants/cross-complainants/appellants Gevorkyan, Freedom Baking Company, Inc. (Freedom Baking), and Freedom Candy, Inc. (Freedom Candy). We use “Kirakosian” to refer both to Arsen Kirakosian, an individual, and jointly to plaintiffs/cross-defendants/respondents Kirakosian, Irina Aslanyan (Kirakosian’s wife), and Mediterranean Best Foods, Inc. (a corporation owned by Kirakosian and Aslanyan).

² We use the terms “law” and “legal” to refer to claims derived from English common law, as distinct from “equitable” claims developed by the English chancery courts. (See *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 288.)

Before the equitable phase of trial commenced, Kirakosian moved for judgment notwithstanding the verdict on trademark infringement, contending that Gevorkyan had presented no evidence of harm resulting from the alleged trademark infringement. The court agreed that the \$240,000 verdict should be set aside because there was no evidence of Gevorkyan's lost profits, but it deferred ruling on whether judgment notwithstanding the verdict should be granted as to the entire trademark infringement cause of action.

The court then conducted a bench trial of Gevorkyan's equitable claims—i.e., declaratory judgment as to ownership of the corporation that owned the bakery and its associated trademarks, replevin with regard to the bakery equipment, and unfair competition. In a lengthy statement of decision, the court weighed the evidence and made credibility findings to conclude that Kirakosian was the true owner of the bakery, its equipment, and its trade names. On the basis of these factual findings, the court (1) entered declaratory judgment to the effect that Kirakosian was the owner of the bakery and its assets, including the contested trade names and trademarks, (2) entered judgment for Kirakosian on Gevorkyan's cause of action for replevin and unfair competition, and (3) entered judgment for Kirakosian on the cause of action for trademark infringement after granting Kirakosian's motion for judgment notwithstanding the verdict "based on the facts found herein."

As we now discuss, in cases involving mixed issues of law and equity, a trial court may not act as a finder of fact on issues it reserved for jury determination. In the present case, by refusing to be bound by the jury's findings on common issues of fact and by granting judgment notwithstanding the verdict on the

basis of its own weighing of the evidence, the court improperly usurped the function of the jury and deprived Gevorkyan of his right to a jury trial of his legal claims with regard to ownership of the trademarks. We therefore reverse the judgment and remand the case to the trial court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Underlying Facts³

A. Kirakosian and Gevorkyan Enter into a Written Agreement, and Gevorkyan Begins Running Shushan Bakery

Kirakosian and Gevorkyan are both natives of Armenia. In the 1990's, Kirakosian opened Shushan Bakery, sometimes referred to as Shushan Lavash, which sold lavash and other Armenian and Russian breads. Initially, the business was incorporated as A.V. Enterprises d/b/a Shushan Bakery; subsequently, it was reincorporated as Shushan Bakery, Inc., and then, in 2006, as Freedom Baking Company, Inc.

Kirakosian's 2006 transfer of control of the bakery and Freedom Baking Company, Inc. to Gevorkyan. In 2006, Kirakosian and Gevorkyan entered a business arrangement that is at the center of the present litigation. Gevorkyan testified that in 2006, Kirakosian agreed to sell him the bakery and Freedom Baking Company, Inc. for \$600,000. The \$600,000 was to be paid to Kirakosian and his business partner, Ruben Babayan, in monthly installments over five years. According to Gevorkyan,

³ Because Gevorkyan has not asserted a substantial evidence challenge to the court's findings, we provide only a brief summary of the evidence.

the sale of the bakery included its equipment, customer lists, recipes, and brand names, including Shushan Lavash and Sasoon Lavash. Gevorkyan subsequently obtained trademarks for “Shushan Lavash” and “Sasoon Lavash.”

Kirakosian denied there was a sale. He testified that in 2006 he turned over management of the bakery to Gevorkyan, but did not sell the business to him. Kirakosian said he did not pay Gevorkyan a salary, but instead allowed Gevorkyan to keep all profits from the business, above weekly payments to Kirakosian and monthly payments to Ruben Babayan, to whom Kirakosian owed money.

Exhibit 27. It is undisputed that on May 1, 2006, Kirakosian, Babayan, and Gevorkyan signed an agreement, introduced at trial as Exhibit 27. That agreement identified Gevorkyan as the “borrower[]” and Babayan and Kirakosian as the “lender[s],” and stated that “[t]he borrower[] confirm[s] by signing this document the receipt of \$600,000 as a loan and [is] responsible in full for the payments.” The agreement provided that “[o]n April 1, the borrower will take-over the bakery ‘Shushan Lavash’ and all other bakery products production and retail facility which will be located on 6226 San Fernando Road, Glendale, CA 91201. The payments will be made by check starting at June 1, 2006 payable to Ruben Babayan of the amount of 50% and Arsen Kirakosian of the amount of 50% of the total amount of the payment of the monthly payment.” The bakery’s equipment, assets, and accounts receivable were identified as “collateral for the loan,” which “shall not [bear] interest.” Further, “[a]fter the 1st payment is paid to ‘lender,’ lender will transfer the new corporation stocks to borrower’s name.”

Gevorkyan and Babayan testified that Exhibit 27 memorialized Kirakosian's and Babayan's sale of the bakery and Freedom Baking to Gevorkyan. In contrast, Kirakosian testified that Exhibit 27 did not evidence a sale of the bakery, but instead was a written agreement that Gevorkyan would repay Kirakosian's preexisting debt to Babayan out of the bakery's profits. Kirakosian said he was not able to read the document because he does not read English.

Shortly after the parties signed Exhibit 27, Gevorkyan asked his attorney to draft a revised version of the agreement. The terms of the revised agreement, Exhibit 3, were substantially similar to the terms of the original, but described the parties as "seller" and "buyer," rather than "borrower" and "lender," and referred to the transaction as the purchase and sale of Freedom Baking, "a California corporation operating a wholesale and retail bakery known as Shushan Bakery, aka Shushan Lavash," rather than as a "loan." Gevorkyan testified that he, Kirakosian, and Babayan all signed Exhibit 3. Kirakosian testified that he did *not* sign Exhibit 3, and he introduced expert testimony that his purported signature on Exhibit 3 was forged.

Gevorkyan's payments to Kirakosian and Babayan. It is undisputed that, between 2006 and 2011, Gevorkyan paid Babayan approximately \$300,000, and paid Kirakosian approximately \$850,000. Gevorkyan testified that of the \$850,000 he paid to Kirakosian, \$300,000 was for the purchase of the bakery and Freedom Baking, \$350,000 was for the purchase of a 50 percent interest in a restaurant owned by Kirakosian called "Notte Luna," and \$200,000 was a loan that Gevorkyan extended to Kirakosian. Kirakosian disagreed: He testified that he did not agree to allow Gevorkyan to buy half of "Notte Luna,"

that he never borrowed money from Gevorkyan, and that the \$850,000 represented the payments Gevorkyan had agreed to make to him out of the profits of the bakery.

B. Kirakosian Resumes Running Shushan Bakery in 2011

It is undisputed that in late 2011 or early 2012, Kirakosian and his wife resumed the day-to-day operations of the bakery and locked Gevorkyan out. However, the parties gave entirely different accounts of the transfer and lockout, as follows.

Transfer of Mediterranean Best Foods from Gevorkyan to Kirakosian and Aslanyan. It is undisputed that Gevorkyan agreed in December 2011 to transfer a shell corporation, Mediterranean Best Foods, to Kirakosian and Aslanyan. The transfer was effective on December 23, 2011.

Loan repayment agreement. On December 23, 2011, Kirakosian signed a document referred to by the parties as the “loan repayment agreement.” The loan repayment agreement recited that Gevorkyan had loaned \$550,000 to Kirakosian and Aslanyan, and set out a loan repayment schedule. Gevorkyan testified that the loan repayment agreement memorialized Kirakosian’s agreement to repay the \$200,000 Gevorkyan had loaned Kirakosian, plus the \$350,000 Gevorkyan had paid to buy a half interest in Notte Luna. Kirakosian testified that he never borrowed money from Gevorkyan and never agreed to any loan repayment terms. He acknowledged signing documents on December 23, 2011, but said Gevorkyan did not tell Kirakosian what he was signing.

Kirakosian resumes running the bakery. In late 2011, Kirakosian resumed day-to-day operation of the bakery. The parties gave different accounts of the circumstances that led up to that resumption and whether it was intended to be permanent. It is undisputed, however, that by about February 2012, Kirakosian had locked Gevorkyan out of the bakery. Since that time, Kirakosian has continued to operate the bakery, initially as Freedom Baking Company, Inc., and later as Mediterranean Best Foods, Inc., to which he purported to transfer all of the bakery's assets.

II.

The Present Action

A. Complaint and Cross-Complaint

On June 26, 2012, Kirakosian filed the present action against Gevorkyan and his attorney, Arnold Ogren (not a party to this appeal). On July 18, 2012, Gevorkyan filed a cross-complaint against Kirakosian, Aslanyan, and Mediterranean Best Foods.

After repeated demurrers, Kirakosian's operative pleading was the Fourth Amended Complaint, which alleged causes of action for fraud, breach of fiduciary duty, and declaratory relief, all apparently based on the common factual premise that Kirakosian's and Aslanyan's signatures on the December 23, 2011 loan repayment agreement were fraudulently obtained.

Gevorkyan's operative pleading was the Second Amended Cross-Complaint. As relevant here, the Second Amended Cross-Complaint alleged three legal causes of action and four equitable causes of action. The legal causes of action were as follows:

(1) The eighth cause of action, for intentional interference with business relations, alleged that Kirakosian had interfered with Gevorkyan's ability to pay off his bank loans by

usurping control over the bakery's business operations and revenue stream.

(2) The ninth cause of action, for trademark infringement (15 U.S.C. § 1114), alleged that Kirakosian was producing, distributing, and selling goods under the brand names Shushan Lavash, Sasoon Lavash, and Roll-A-Bread Wraps, which Gevorkyan had registered with the U.S. Patent and Trademark office.

(3) The twelfth cause of action, for breach of contract, alleged that Kirakosian and Aslanyan failed to make payments pursuant the loan repayment agreement.

The equitable causes of action were as follows:

(4) The first cause of action (declaratory relief — ownership of and control of Freedom Baking)⁴ sought a

⁴ We note that a cause of action for declaratory relief is not necessarily an equitable claim to which there is no right to a jury trial. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 159, fn. 1 (*Hoopes*).) “Our courts have frequently ‘characterized’ declaratory relief actions as ‘being “equitable . . .” [in nature].’ [Citation.] They are, ‘in fact, *sui generis* and may raise either legal or equitable issues.’ [Citation.] Consequently, the right to a jury ‘may not be denied . . . simply because the [] action is one for declaratory relief.’ [Citation.] Rather, as with other types of claims, “the proper inquiry is the sometimes difficult one whether the *issues* [raised in the action] are legal or equitable in nature.” ’ [Citation.]” (*Entin v. Superior Court* (2012) 208 Cal.App.4th 770, 777.) However, Gevorkyan has not challenged the equitable nature of his declaratory judgment claims, and thus for purposes of this appeal we address only the trial court's authority to disregard the jury's prior determinations, *not* the court's authority to try the declaratory judgment claims without a jury.

declaration that Gevorkyan “is the rightful owner of Freedom Baking Company, Inc., and all of its equipment, brand names, trademarks, good will, and assets.”

(5) The third cause of action (declaratory relief—ownership of the “Shushan Lavash” and “Sasoon Lavash” brands) sought a declaration that Gevorkyan was the rightful owner of “Shushan Lavash” and “Sasoon Lavash” brand names.

(6) The sixth cause of action (replevin) alleged that Kirakosian had wrongfully retained possession and control over the bakery’s equipment and machinery.

(7) The seventh cause of action (unfair business practices and unfair competition—Bus. & Prof. Code, §§ 17200, 17203) alleged that Kirakosian engaged in unfair or fraudulent business practices, including the production, distribution, marketing, advertising, transportation, delivery, offering for sale, and sale of fraudulently acquired brand names and goods.

B. Jury Trial

Prior to trial, it was agreed that Kirakosian’s and Gevorkyan’s legal claims would be tried to a jury; following the jury trial, the equitable claims would be tried to the court.

A jury trial proceeded over 14 days in November and December 2013. On December 26, 2013, the jury returned a special verdict, finding as follows:

Kirakosian’s claims: The jury rejected all of Kirakosian’s legal claims against Gevorkyan. Specifically, the jury found: (1) as to Kirakosian’s intentional misrepresentation claim, Gevorkyan did not make an intentional misrepresentation to Kirakosian and/or Aslanyan; (2) as to Kirakosian’s concealment claim, Gevorkyan did not actively conceal or intentionally fail to disclose an important fact that Kirakosian or Aslanyan did not

know and could not reasonably have discovered; and (3) as to Kirakosian's punitive damage claim, Gevorkyan did not act with malice, oppression, or fraud.

Gevorkyan's trademark infringement claims: The jury returned a special verdict for Gevorkyan on his trademark infringement claims. Specifically, the jury found that Gevorkyan owned 16 "valid, protectable trademarks": Shushan Lavash, Sasoon Lavash, Eat Bread—Live Longer, Handmade Lavash Wraps, Tehran Lavash, Sandwich Lavash, Shiraz Lavash, Vanadzor Lavash, Shushan Barbari Bread, Shoti Bread, Shushan Bread, Romanoff Bread, Baltik Bread, Zaporozhskiy Bread, Stolichniy Bread, and Borodinsky Bread. The jury also found that Kirakosian used these trademarks without consent in a manner likely to cause confusion among ordinary consumers; and that of these infringements, three were intentional, and thirteen were unintentional. Finally, the jury awarded Gevorkyan trademark infringement damages of \$240,000, which the jury found represented the profits earned by Kirakosian attributable to the infringement or false designation.

Gevorkyan's other claims: The jury rejected Gevorkyan's other claims against Kirakosian, finding that (1) Gevorkyan, Kirakosian, and Aslanyan did not enter a loan repayment agreement in December 2011, (2) Kirakosian did not make a false representation of an important fact to Gevorkyan, and (3) Kirakosian and Aslanyan did not know about Gevorkyan's bank loans. The jury also found that Mediterranean Best Foods acted with malice, fraud, or oppression, but that no punitive damages should be assessed.

C. Motion for Judgment Notwithstanding the Verdict

On January 24, 2014, Kirakosian filed a motion for judgment notwithstanding the verdict (JNOV), urging, among other things, that Gevorkyan had presented no evidence of his damages from the alleged trademark infringement.

On May 16, 2014, the court granted the JNOV motion in part, explaining that the \$240,000 award would be set aside because Gevorkyan had presented no evidence of his lost profits. Additionally, the court said it would hear additional argument “as to whether the entire Judgment on the issue of trademark infringement must be set aside and Judgment entered for [Kirakosian] on that cause.”

On June 6, 2014, Gevorkyan filed a brief in which he argued that actual injury is not an element of a cause of action for trademark infringement, and that the jury’s verdict on trademark infringement was binding on the court. Gevorkyan thus urged the court to issue a declaratory judgment in his favor as to the control and ownership of the Shushan Lavash and Sasoon Lavash brands, and to enjoin Kirakosian from further infringing the trademarks submitted to the jury.

D. Equitable Trial

The court then proceeded to the equitable phase of trial. Before receiving any additional evidence, the court engaged in the following colloquy with Gevorkyan’s counsel, Mr. Asatryan, regarding the scope of the issues before the court:

“The Court: [M]y minute order specified exactly the testimony that the court is seeking in this hearing for the court to determine the causes of action that are before the court. I view the most important one to be the declaratory relief claim . . . as to

who owns the bakery. . . . I view that as impacting each of the other causes of action. . . .

“There’s a legal question that was open for today on the post judgment issues such as whether the court’s JNOV on monetary damages, which is the court’s order, is a complete judgment on that cause of action or not.

“And Mr. Asatryan is correct that the case authority is clear that one doesn’t need to have or demonstrate damages to secure a remedy for trademark infringement since actual injury need not be proven. However, . . . I’m not entering the judgment at this time because I believe, notwithstanding the jury verdict, that the declaratory relief action that’s in front of me potentially affects that judgment. Were I to find that Exhibit 27 is either invalid or does not create a sale of the bakery currently being utilized by [Kirakosian], it is possible that the court’s order would negate any jury judgment of trade secret violation. [¶] Mr. Asatryan, would you agree?

“Mr. Asatryan: Actually, your honor, in that same brief, we cited some case law . . . which discusses that, when there are legal and equitable causes of action before the court and the jury, when one is decided before the other, it’s actually binding on the other. So the jury’s actual finding of the ownership of the trademarks, in my opinion, Your Honor, in these cases is binding on the court.

“The Court: Well, JNOV was requested. So that’s –

“Mr. Asatryan: Right, but my understanding is . . . the declaratory relief on the trademark issues, on the ownership of the trademarks, Your Honor—I believe that the court is bound by the jury’s actual finding.

“The Court: We’ll see, since there is a judgment notwithstanding the verdict part, which is still open as to whether the judgment will be issued.

“Mr. Asatryan: My understanding, Your Honor, is that the court cannot consider evidence on the JNOV, cannot weigh the evidence.

“The Court: I’m not considering evidence on the JNOV. I’m considering evidence on the declaratory relief. And if . . . the evidence I secure on the declaratory relief invalidates any possibility of a trademark infringement, the court would then grant JNOV on the entire cause of action.”

E. Statement of Decision

The trial court issued a Final Statement of Decision on November 6, 2014. It began by summarizing the case’s procedural history, noting that the court had granted JNOV as to trademark infringement damages, but had continued the JNOV motion until the end of trial on the equitable claims, “the Court determining that whether or not the jury’s verdict was supported by the evidence and the law was dependent on the Court’s determination of the Cross-Defendants’ declaratory relief action regarding ownership of Freedom Baking, Inc.” The court then summarized the evidence and made findings of fact and conclusions of law, as follows:

“Findings

“A. [Gevorkyan] has not demonstrated by a preponderance of the evidence that [Exhibit 27] constituted the sale of Freedom Baking, Inc., Shushan Bakery a/k/a Shushan [Lavash]. The Court relies on the ambiguity of the document and the conduct of the parties to support this finding, including, inter alia, 1) [Gevorkyan’s] conduct outlined above is inconsistent with

his claim that he purchased Shushan Bakery and Freedom Baking Inc., 2) testimony of two employees of Shushan Bakery, Karine Aslanyan and Nazaret Najaryan, that they reported to Kirakosian and understood that Gevorkyan was the bakery's manager, 3) the expert's credible testimony that the signature on the Loan Repayment Agreement is not Aslanyan's and the signatures on [Exhibit 3] and [the] lease agreement [are] not Kirakosian's, and 4) the credibility of the parties, including Gevorkyan's offering agreements as signed by [Kirakosian and Aslanyan] which the Court concludes were forgeries. Thus the court finds that Freedom Baking, Inc. (as it was called in the Agreement) and Shushan Bakery a/k/a Shushan [Lavash] were not sold to Gevorkyan by the agreement of May 1, 2006 (Exhibit 27) and that [Exhibit 3] was not signed by Kirakosian.

“B. As a result of the Court's finding that Freedom Baking Inc. and Shushan Bakery were not sold in 2006, there is insufficient evidence to demonstrate that the equipment, machinery and other assets of the bakery, which Gevorkyan seeks to be returned to him in his replevin action, are owned by Gevorkyan.

“C. The Court finds that the 2011 Loan Repayment Agreement and the shares of stock in Mediterranean Best Foods alleged to be granted to Gevorkyan as collateral for repayment of the loan, were not signed by Aslanyan. Instead, the \$554,000 paid to Kirakosian were the assets of the bakery and did not constitute a loan.

“D. [Gevorkyan's] unfair business practices and trademark claims are based on Kirakosian's continued production of 'Shushan [Lavash],' '[Sasoon Lavash],' 'Roll-A-Bread Wraps,' and certain Freedom Candy products Shushan [Lavash]

(named after Kirakosian’s mother) and Sasoon [Lavash] have always been produced by Kirakosian at Shushan Bakery. . . . Thus, the Court must conclude that there is no evidence that Kirakosian ever improperly interfered with Gevorkyan’s ‘trademarks’ or ‘brand’ or engaged in unfair competition as to the breads produced by Kirakosian at Shushan Bakery. Further, since the Court finds that Kirakosian owned the bakery throughout the period at issue in this litigation, these products and brands belonged to Kirakosian, and the trademarks were improperly secured by Gevorkyan. . . .”

“Conclusions

“A. Declaratory Relief:

“1. The Court declares that the Loan Repayment Agreement and the shares in Mediterranean Best Foods signed by Gevorkyan are not enforceable. The shares shall be returned to Aslanyan.

“2. The Court declares that Kirakosian is the owner of Freedom Baking Inc. and Shushan Bakery, and its assets. . . . [Exhibit 27] is ambiguous, at best, and in some parts incomprehensible, resulting in the need for parol evidence to determine the intent of the parties. Where the evidence, as here, is contradictory as to the meaning of the contract, the resolution of the conflict is a question of fact for the Court. [Citation.] Here, the Court has relied on the testimony of Kirakosian and the subsequent conduct of Gevorkyan to determine that the agreement was not one for sale of the bakery. Further, [t]he contract is not enforceable because the evidence reflects that there was no mutual intent as to the meaning of the language of the agreement. . . . Additionally, Civil Code § 1640 expresses that ‘when, through fraud, mistake or accident, a written contract

fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts disregarded.’ The Court finds that Kirakosian did not read English and relied instead on Gevorkyan’s and Babayan’s explanation of the meaning of the agreement. Based on the evidence set forth at length above, the Court finds that Kirakosian did not agree to sell Freedom Baking, Inc. and Shushan Bakery on May 1, 2006.”

“B. Replevin – Initially, the Court notes that Replevin is an unsuitable remedy when the contract for the sale of goods is uncertain. Further, as [Gevorkyan] noted, in his action for Replevin, [Gevorkyan] needed to show that he had the right to possess property that can be identified and seized. Based on the foregoing findings, the Court finds for [Kirakosian] on the cause of action for Replevin.

“C. The Court finds for [Kirakosian] on the claims of unfair competition and trademark infringement. By this finding, the Court grants [Kirakosian’s] motion for judgment notwithstanding the verdict, based on the facts found by the court herein. Having found that the assets of Freedom Baking, Inc. and Shushan Bakery were not sold to Gevorkyan, the trademarks, brands, and other bread product designations were owned at all times by [Kirakosian].”

Judgment was entered on July 10, 2015. Gevorkyan timely appealed from the judgment.

DISCUSSION

Gevorkyan makes two primary claims on appeal. First, he urges that the trial court erred in disregarding the jury’s determinations that Gevorkyan owned all of the trademarks at issue and that Kirakosian infringed those trademarks. Second, Gevorkyan contends that the trial court erred in granting

judgment notwithstanding the verdict with regard to the jury's trademark infringement verdict.⁵ As we now discuss, Gevorkyan is correct in both respects.

I.

The Trial Court Erred in Failing to Adhere to the Jury's Determinations of Common Issues of Fact when Ruling on the Equitable Claims

A. General Principles Governing Trial of Legal and Equitable Issues

“Historically, there were separate law and equity courts. . . . The separate law and equity courts were merged, but the distinction between law and equity remains to this day.’

[(*Hoopes, supra*, 168 Cal.App.4th at p. 155.)] A jury trial is a matter of right in a civil action at law, but not in equity.

[Citation.] (*Darbun Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 408 (*Darbun*).)

Because a litigant has the right to a jury trial of legal claims, but not of equitable ones, “[c]omplications arise when legal and equitable issues (causes of action, requested remedies, or defenses) are asserted in a single lawsuit. . . . In most instances, separate equitable and legal issues are “kept distinct and separate,” with legal issues triable by a jury and equitable issues triable by the court. [Citations.]’ (*Hoopes, supra*, 168 Cal.App.4th at p. 156.)” (*Darbun, supra*, 239 Cal.App.4th at p. 408.)

⁵ Gevorkyan does not challenge the court's grant of partial judgment notwithstanding the verdict with regard to the \$240,000 damage award.

The order of trial in mixed actions with equitable and legal issues has great significance because the first fact finder may bind the second when determining factual issues common to the equitable and legal claims. (*Darbun, supra*, 239 Cal.App.4th at p. 408; *Hoopes, supra*, 168 Cal.App.4th at pp. 156–157.) The order of proof generally is discretionary with the trial court (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1285), and although there is some California authority for the proposition that equitable claims generally should be decided first—an issue we do not reach—“it is equally clear that a jury’s determination of legal issues may curtail or foreclose equitable issues. (*Hughes v. Dunlap* [(1891)] 91 Cal. [385], 388, [27 P. 642]; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence [(The Rutter Group 2008)] ¶ 2:166, pp. 2-32.2–2-32.3; see *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 487, 54 Cal.Rptr.2d 888 [holding that bench findings bind jury upon reasoning equally applicable to the reverse: ‘[i]ssues adjudicated in earlier phases of a bifurcated trial are binding in later phases of that trial and need not be relitigated’].)” (*Hoopes*, at p. 157.)

“The reason why the first fact finder binds the second on common issues of fact is not hard to discern. The United States Supreme Court likened the situation to collateral estoppel, where a party is precluded from relitigating an issue tried in a prior action. (*Beacon Theatres, Inc. v. Westover* [(1959)] 359 U.S. [500,] 504-505, [79 S.Ct. 948, 3 L.Ed.2d 988].) A California court has made a similar analogy: ‘Just as the parties are bound by collateral estoppel where issues are litigated in a prior action, so, too, do issues decided by the court in the equitable phase of the trial become “conclusive on issues actually litigated between the

parties.”’ [Citation.] While the comparison to collateral estoppel is inexact [citation], there are solid policy reasons for giving one factfinder’s determinations binding effect in a mixed trial of legal and equitable issues. The rule minimizes inconsistencies, and avoids giving one side two bites of the apple. [Citation.] The rule also prevents duplication of effort. [Citation.]” (*Hoopes, supra*, 168 Cal.App.4th at p. 158.)

*B. The Trial Court Was Bound by the Jury’s
Determination of Facts Common to the Legal
and Equitable Claims*

1. Legal Authority

The principle that a jury’s determination of legal issues is binding on a court’s subsequent determination of related equitable questions is well established in California. Our Supreme Court first articulated this principle in *Hughes v. Dunlap, supra*, 91 Cal. 385 (*Hughes*), where a plaintiff sued for trespass and sought both damages (legal) and an injunction (equitable). The jury returned a defense verdict on the damages claim, but the trial court rejected the findings of the jury and awarded the plaintiff damages and an injunction. (*Id.* at p. 388.)

The defendant appealed, arguing that the trial court was bound by the jury’s verdict denying damages. (*Hughes, supra*, 91 Cal. at pp. 386–387.) The Supreme Court reversed on the narrow point raised by the defendant, holding that the trial court erred in disregarding the jury’s verdict on damages. (*Id.* at pp. 388–389.) It explained that as to damages, a legal issue, “the court erred in disregarding the verdict of the jury, and setting it aside without the proceeding of a motion for a new trial. . . . An action to recover damages for past trespasses is as clearly a legal remedy as any that could be named; and it is an action in which a

party cannot be deprived of a jury trial. For this reason, therefore, the judgment and order must be reversed.” (*Id.* at p. 388.)

The high court then went on to comment on the impropriety of the trial court granting an injunction inconsistent with the jury’s findings. As relevant here, the court observed as follows: “Of course, it is always for the judge sitting as a chancellor to determine whether, when certain rights are established, he will grant an equitable remedy prayed for, or compel a party to be satisfied with his legal remedy; but when the asserted rights upon which any remedy must rest are legal rights, and cognizable in a court of law, must not those rights be determined according to the methods of a common-law court? And in such a case can a party be deprived of his constitutional privilege of a jury? . . . ‘There is certainly no impossibility, nor even difficulty, in requiring a jury to decide the issues of fact upon which the right to many kinds of equitable remedies depends; this is the province of a jury in legal actions, the court pronouncing the judgment upon their verdict. A jury is clearly incompetent to frame and deliver a decree according to the doctrines and methods of equity; but there can be no real obstacle in the way of its ascertaining the facts by its verdict, and leaving the court to shape the decree and award the relief based upon these facts, in many species of equitable remedies.’” (*Hughes, supra*, 91 Cal. at pp. 389–390.)

The Court of Appeal was guided by *Hughes* in the more recent case of *Hoopes, supra*, 168 Cal.App.4th 146. There, a commercial tenant sued its landlord, claiming exclusive parking rights under a lease. (*Id.* at p. 150.) The lower court impaneled a jury on the tenant’s legal claims, and the jury returned a verdict

for the tenant. However, at a subsequent hearing on the parties' competing requests for declaratory and injunctive relief, the court rejected the jury's factual findings and determined, contrary to the jury's special verdict, that the lease provided for shared parking, and thus the tenant did not have the right to exclude other tenants' customers from the parking lot. The tenant appealed. (*Id.* at pp. 154–155.)

The Court of Appeal reversed. It explained that where legal issues are tried first, the judge cannot ignore the jury's verdict and grant equitable relief inconsistent with the jury's findings. The court cited *Hughes* for the proposition that a jury's factual findings on legal causes of action should bind the trial court when granting ancillary equitable remedies based on the same facts. It then concluded: "The trial court in this case departed from this principle [¶] . . . [¶] . . . The trial court erred in disregarding the jury's verdict when fashioning equitable relief founded on the same evidence and same operative facts as the verdict. In a mixed trial of legal and equitable issues where legal issues are first tried to a jury, the court must follow the jury's factual determinations on common issues of fact." (*Hoopes, supra*, 168 Cal.App.4th at pp. 159–161.)

2. Analysis

In the present case, the trial court explicitly rejected the jury's factual findings with respect to Gevorkyan's ownership of the trademarks when it ruled on the equitable claims for declaratory relief, replevin, and unfair business practices. As we have described, the jury made special findings that the trademarks at issue were "valid, protectable trademarks" that were "own[ed]" by Gevorkyan and were infringed by Kirakosian. The trial court explicitly refused to be bound by these findings,

stating that the ownership of the trademarks turned on whether Gevorkyan owned the bakery and its assets, and thus the court's decision on the jury's trademark infringement verdict "was dependent on *the Court's determination* of [Gevorkyan's] declaratory relief action regarding ownership of Freedom Baking Inc." (Italics added.)

The court then engaged in a thorough review of all of the evidence and concluded—contrary to the facts as determined by the special verdict—that "since *the Court finds* that Kirakosian owned the bakery throughout the period at issue in this litigation," the brands Shushan Lavash, Sasoon Lavash, Roll-A-Bread Wraps, and certain Freedom Candy products such as Fruitjelly Marmalade "belonged to Kirakosian, and the trademarks were improperly secured by Gevorkyan." The court further determined "*based on the facts found by the court herein*" that "the assets of Freedom Baking Inc. and Shushan Bakery were not sold to Gevorkyan," and thus that "the trademarks, brands and other bread product designations were owned at all times by [Kirakosian]." (Italics added.)

These findings were necessarily and explicitly based on a rejection by the court of the jury's factual determinations that Gevorkyan owned the trademarks at issue, and thus they violated the principles articulated in *Hughes* and *Hoopes*. The jury's factual finding that Gevorkyan owned 16 "valid and

protectable trademarks” was not subject to being revisited by the trial court in the equitable phase of the proceedings.⁶

II.

The Trial Court Compounded Its Error by Reweighing the Evidence in Granting Judgment Notwithstanding the Verdict

The trial court purported to justify its rejection of the jury’s factual findings by granting judgment notwithstanding the verdict on the trademark infringement claim. The court explained that it had deferred ruling on the JNOV motion until the end of the trial on the equitable claims, “the Court determining that whether or not the jury’s verdict was supported by the evidence and the law was dependent on” the court’s factual determinations. The court then granted the JNOV motion, “*based on the facts found by the court herein.*” (Italics added.) The court explained that “since the Court finds that Kirakosian

⁶ Of course, if a trial court “is convinced from the entire record . . . that the court or jury clearly should have reached a different verdict or decision,” it has the power to grant *a motion for new trial* pursuant to Code of Civil Procedure section 657. When ruling on a motion for new trial, a trial court has the power to “sit[] ‘as a thirteenth juror,’ asking whether ‘the weight of the evidence appears to be contrary to the jury’s determination’”; in so doing, the court is free to “disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact.” [Citation.]” (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 900.) In the present case, however, the trial court did *not* grant a motion for new trial, but instead rejected the jury’s factual findings, replaced the special verdict with its own factual findings, *and ordered judgment thereon*. This exceeded the trial court’s power and violated Gevorkyan’s right to a trial by jury.

owned the bakery throughout the period at issue in this litigation,” the court “must conclude that there is no evidence that Kirakosian ever properly interfered with Gevorkyan’s ‘trademarks’ or ‘brand’ or engaged in unfair competition as to the breads produced by Kirakosian at Shushan Bakery.”

The court’s analysis of the JNOV motion was based on a misapplication of the standards governing such motions. “[A] court’s ‘ “power to grant a judgment notwithstanding the verdict is identical to [its] power to grant a directed verdict [citations]. *The [court] cannot reweigh the evidence [citation], or judge the credibility of witnesses. [Citation.] . . .* “A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is *no substantial evidence* to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.” ’ ’ ’ ’ (Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal.App.4th 212, 226–227.)” (*Tun v. Wells Fargo Dealer Services, Inc.* (2016) 5 Cal.App.5th 309, 333, italics added and omitted.)

In the present case, the trial court acknowledged that there was evidence to support the jury's verdict, including Gevorkyan's and Babayan's testimony that Exhibit 27 was an agreement by Babayan and Kirakosian to sell Freedom Baking and Shushan Bakery, including their brand names, to Gevorkyan; and undisputed evidence that in the course of approximately five years, Gevorkyan paid Babayan \$300,000 and paid Kirakosian \$854,674. There also was evidence that after 2011, Kirakosian continued to sell the contested brands. However, the court disbelieved Gevorkyan's and Babayan's testimony, and then relied on its own credibility determinations to grant the JNOV motion. This was error.

The Court of Appeal addressed a similar circumstance in *Darbun, supra*, 239 Cal.App.4th 399. There, a tenant sued its landlord for breach of a commercial lease agreement, seeking damages and specific performance. The trial court elected to conduct an initial phase of trial in order to determine whether the equitable remedy of specific performance was appropriate, but made clear that this first phase was not being held to adjudicate the issue of breach. (*Id.* at p. 405.) After hearing some testimony, however, the court indicated it could not yet make a ruling on the availability of specific performance as a remedy, and instead said the case would continue to the jury to decide whether the landlord improperly terminated the lease. (*Id.* at p. 406.)

At the close of the tenant's case in chief, the landlord moved for a nonsuit. The court granted nonsuit on specific performance only and allowed the issue of damages to go to the jury. The jury returned a verdict for the tenant, making special findings that the tenant did all or substantially all of the things the lease required it to do; the conditions required for the landlord's continued performance under the lease had been satisfied; the landlord was not excused from its obligations under the lease; and the tenant had been harmed by the landlord's breach. (*Darbun, supra*, 239 Cal.App.4th. at pp. 407–408.)

The trial court then granted the landlord's motion for judgment notwithstanding the verdict. The court stated that, in ruling on the nonsuit motion, it had made findings that the tenant had breached the lease by failing to perform its obligations within a reasonable amount of time and had proceeded in a manner that was not contemplated by the contract, rendering the lease unenforceable. The court concluded that these findings, made in the context of its findings on the equitable action, were binding on the jury. The court additionally found that the jury verdict was not supported by substantial evidence because, once the court had made its equitable findings, “‘nothing further remained to be tried by the jury.’” (*Darbun, supra*, 239 Cal.App.4th. at p. 408.)

The Court of Appeal reversed. It explained that the trial court improperly made findings concerning the tenant's breach and the unenforceability of the lease “in the context of a nonsuit motion, after the court weighed evidence and made credibility determinations.” (*Darbun, supra*, 239 Cal.App.4th at p. 410.) This was error, because for purposes of a nonsuit motion, the court may not weigh the evidence or consider the credibility of

witnesses. (*Ibid.*) The lower court then compounded the error by relying on its own weighing of evidence and credibility determinations to grant the JNOV motion, thus depriving the tenant of its right to a jury trial. The reviewing court explained: “[The tenant] had a right to jury trial on its breach of contract claim, and it never waived that right. (Code Civ. Proc., § 592 [‘In actions for . . . breach of contract, . . . an issue of fact must be tried by a jury, unless a jury trial is waived’].) The parties proceeded through the first phase of trial, then to jury trial, under the court’s assurances that the jury would decide the issue of breach. The court’s finding of breach, if it was an actual ruling of the court, improperly usurped an issue that was reserved for the jury.” (*Darbun*, at p. 411.)

The reviewing court continued: “Had the trial court properly informed the parties of an intention to decide the issue of breach, [the tenant] would have had the opportunity to preserve its right to a jury trial by abandoning its request for equitable relief and seeking only damages. The absence of equitable claims to be tried would have eliminated the court’s right to act as the equitable fact finder, leaving the jury to decide [the tenant’s] legal claims. [Citation.] As [tenant] was under the impression that the jury, not the court, was the fact finder on breach, it did not have the opportunity to make an ‘election of remedies in order to secure a trial by jury.’ [Citation.]” (*Darbun*, *supra*, 239 Cal.App.4th at pp. 411–412.)

Darbun is on point. Here, as in *Darbun*, the trial court advised the parties that it would allow the legal issues to be decided by a jury. However, instead of entering judgment on the jury’s verdict, the court independently evaluated the evidence common to the legal and factual claims, made factual findings

contrary to those reached by the jury, and then relied on its own factual findings to grant judgment notwithstanding the verdict. This was a misuse of the JNOV procedure, and it deprived Gevorkyan of his right to have his legal claims with respect to ownership of the trademarks decided by a jury.⁷

⁷ Kirakosian urges that the grant of judgment notwithstanding the verdict may be affirmed because “fourteen of the brand names were never alleged in the cross-complaint.” Regardless, each of the 16 brand names was included in the special verdict forms *jointly* proposed by Gevorkyan and Kirakosian. Kirakosian therefore may not raise the issue on appeal. (E.g., *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685 [“ ‘Under the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal. [Citations.] Similarly an appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal.’ ”])

Alternatively, Kirakosian suggests that the grant of judgment notwithstanding the verdict may be affirmed because Gevorkyan “failed to meet [his] burden to establish that six of the brand names are valid protectable trademarks rather than descriptive names for *types* of bread,” and because Kirakosian “presented evidence that the trademarks [for Shushan Lavash and Sasoon Lavash] were . . . obtained and acquired illegally.” Kirakosian does not support these assertions with any citations to the appellate record, and thus we deem them to be forfeited. (See *Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 853 [issue forfeited because party “failed to present meaningful legal and factual analysis, with supporting citations to pertinent authority and the record”].)

III.

Instructions on Remand

Having concluded that the trial court erred in failing to be bound by the jury's factual findings that Gevorkyan owned the trademarks, and in granting judgment notwithstanding the verdict on the trademark infringement claim in its entirety, we now turn to remand instructions.

Trademark infringement—liability. As we have discussed, the trial court was without authority to grant the motion for JNOV on the basis of its own evaluation of disputed evidence. Therefore, on remand, we direct the trial court to enter a new order denying the JNOV motion and to reinstate the jury's special verdict that Kirakosian is liable for trademark infringement. The court shall then determine the relief, if any, to which Gevorkyan is entitled, and enter judgment accordingly.

Trademark infringement—damages. Gevorkyan does not contend on appeal that he is entitled to reinstatement of the \$240,000 damages award, and therefore we do not disturb the trial court's grant of partial JNOV striking the \$240,000 damages award.

Declaratory relief claim as to "Shushan Lavash" and "Sasoon Lavash" trademarks. Gevorkyan's third cause of action sought a declaration that "Freedom Baking Company, Inc. is the owner of the registered trademark on the 'Shushan Lavash' and 'Sasoon Lavash' brands." The jury's finding that Gevorkyan, Freedom Baking, and Freedom Candy own the relevant trademarks is dispositive of this cause of action, and therefore we direct the trial court on remand to enter judgment for Gevorkyan on the third cause of action.

Unfair competition. The seventh cause of action alleges that Kirakosian engaged in unfair business practices and unfair competition in violation of Business and Professions Code sections 17200 and 17203, by, among other things, producing, distributing, and selling goods under fraudulently-acquired brand names. It seeks an order (1) enjoining Kirakosian from producing, distributing, selling, and marketing products under “the brand names belonging to Freedom Baking Company, Inc., including ‘Shushan Lavash’ and ‘Sasoon Lavash’ and Freedom Candy, Inc.,” and from “further withholding and confiscating the profits and proceeds of Freedom Baking Company, Inc. and Freedom Candy, Inc.”; and (2) compelling Kirakosian to make restitution for all funds “unfairly, fraudulently, and deceptively obtained” in violation in Business and Professions Code section 17200, to disgorge all revenues acquired “as a result of the unfair, fraudulent, and deceptive business practices alleged herein,” and to return all brand names, equipment, and other assets belonging to Gevorkyan and acquired by Kirakosian “as a result of the unfair, fraudulent, and deceptive business practices alleged herein.”

An action “for unfair competition under Cal. Bus. & Prof. Code §§ 17200 et seq. is ‘substantially congruent’ to a trademark infringement claim under the Lanham Act. [Citation.] Under both, the ‘ “ultimate test” ’ is ‘ “whether the public is likely to be deceived or confused by the similarity of the marks.” ’ [Citations.]” (*Academy of Motion Picture Arts v. Creative House* (9th Cir. 1991) 944 F.2d 1446, 1457; see also *Mallard Creek Industries, Inc. v. Morgan* (1997) 56 Cal.App.4th 426, 438 [substantial likelihood of confusion and deception “are sufficient to establish prima facie cases of both trademark infringement

and common law unfair competition”]; *Aloha Pacific, Inc. v. California Ins. Guarantee Assn.* (2000) 79 Cal.App.4th 297, 318 [“ ‘The common law tort of unfair competition is generally thought to be synonymous with the act of “passing off” one’s goods as those of another. The tort developed as an equitable remedy against the wrongful exploitation of trade names and common law trademarks’ ”].) Accordingly, the jury’s liability finding with regard to trademark infringement is dispositive of the unfair competition claim.

A trial court has broad discretion in fashioning equitable remedies, and Business and Professions Code section 17203 “does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court ‘*may* make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore . . . money or property.’ [Citation.] That is, as our cases confirm, a grant of broad equitable power. A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute.” (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 180.)

Accordingly, whether (and to what extent) Gevorkyan is entitled to equitable relief under Business and Professions Code section 17203 is a matter left to the sound discretion of the trial court on remand. In exercising such discretion, the trial court is bound by the jury’s findings with regard to disputed facts common to the legal and equitable claims, and specifically, the jury’s finding that Gevorkyan owns the subject trademarks.

Declaratory relief as to control and ownership of Freedom Baking Company, Inc. Gevorkyan’s first cause of action sought a declaration that “Gevorkyan, as the sole director, sole shareholder, sole officer, and sole individual in charge of managerial functions of Freedom Baking Company, Inc. since 2006, is the rightful owner of Freedom Baking Company, Inc. and all of its equipment, brand names, trademarks, good will, and assets.” On appeal, Gevorkyan asserts that he included this cause of action because it appeared in the early stages of the litigation that Kirakosian may have been claiming ownership of the corporation, but during trial Kirakosian’s counsel conceded Gevorkyan’s ownership. Kirakosian’s attorney conceded at oral argument that Kirakosian does not challenge Gevorkyan’s ownership of Freedom Baking Company, Inc.

Accordingly, on remand, the court should enter judgment for Gevorkyan as to the first cause of action for declaratory relief as to control and ownership of Freedom Baking Company, Inc.

Replevin. In his appellant’s opening brief, Gevorkyan states that his cause of action for replevin “is not a part of Cross-Complainants’ appeal because Cross-Complainants respectfully submit that ruling on the replevin cause of action was within the sound discretion of the superior court.”⁸ Because the issue of replevin is not before us, it requires no discussion by this court.

⁸ However, “Cross-Complainants remain hopeful that, should their appeal be successful, the superior court will revisit its ruling on the replevin cause of action.”

DISPOSITION

The judgment in favor of Kirakosian is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion, and guided by the jury's determination that Gevorkyan owns 16 valid, protectable trademarks. Gevorkyan is awarded his appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.